

ESTTA Tracking number: **ESTTA466305**

Filing date: **04/10/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204123
Party	Defendant Lavelle Industries, Inc.
Correspondence Address	PATRICK M. BERGIN DAVIS & KUELTHAU, S.C. 111 E KILBOURN AVE STE 1400 MILWAUKEE, WI 53202-6613 pbergin@dkattorneys.com
Submission	Answer
Filer's Name	Patrick M. Bergin
Filer's e-mail	pbergin@dkattorneys.com
Signature	/Patrick M. Bergin/
Date	04/10/2012
Attachments	11215404.PDF (4 pages)(119205 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application
Serial No. 85/439,931
Filed: September 23, 2011
Published: February 28, 2012
Owner: Lavelle Industries, Inc.
For the Trademark: MAXPERFORMANCE

FLUIDMASTER, INC.
a California corporation

Opposer,

v.

Opposition No. 91204123

LAVELLE INDUSTRIES, INC.
a Delaware Corporation

Applicant

ANSWER OF LAVELLE INDUSTRIES, INC.

Lavelle Industries, Inc. ("Applicant") answers the Notice of Opposition as follows:

PREAMBLE

Applicant objects to any allegations contained in the preamble of the Notice of Opposition on the grounds that Fluidmaster, Inc. ("Opposer") has not set forth the allegations contained therein in numbered paragraphs as required by the Federal Rules of Civil Procedure. Without waiving this objection, Applicant admits that Fluidmaster has a place of business at 30800 Rancho Viejo Road, San Juan Capistrano, California 93675 and admits that Applicant

owns registration application no. 85/430,931 for the MAXPERFORMANCE mark ("the Mark") and denies the remaining allegations in the preamble.

1. Applicant does not have sufficient knowledge or information concerning the allegations in paragraph 1 and therefore denies the allegations in paragraph 1

2. Applicant does not have sufficient knowledge or information concerning the allegations in paragraph 2 and therefore denies the allegations in paragraph 2.

3. Applicant does not have sufficient knowledge or information concerning the allegations in paragraph 3 and therefore denies the allegations in paragraph 3.

4. Applicant admits that Opposer filed Application Serial No. 85/471,431 for the name PERFORMAX and admits that Exhibit A is a printout from the USPTO TARR database. Applicant does not have sufficient knowledge or information concerning the remaining allegations in paragraph 4 and therefore denies the remaining allegations in paragraph 4.

5. Applicant does not have sufficient knowledge or information concerning the allegations in paragraph 5 and therefore denies the allegations in paragraph 5.

6. Applicant does not have sufficient knowledge or information concerning the allegations in paragraph 6 and therefore denies the allegations in paragraph 6.

7. Applicant admits the allegations in paragraph 7.

8. Applicant denies the allegations in paragraph 8 and affirmatively alleges that Applicant used its MAXPERFORMANCE mark in interstate commerce prior to the date Opposer began use of the PERFORMAX name and that Opposer's use of the PERFORMAX name is likely to cause confusion, or to cause mistake, or to deceive as to the source, sponsorship or approval of the goods with which the mark is used.

9. Applicant denies the allegations in paragraph 9.

10. Applicant denies the allegations in paragraph 10.

AFFIRMATIVE DEFENSES

11. There is no likelihood of confusion, mistake or deception between Applicant's MAXPERFORMANCE mark and Opposer's MAX name because Applicant's mark is not confusingly similar to Opposer's MAX name.

12. Opposer's MAX name is not sufficiently distinctive to function as a trademark and is therefore not a name in which Opposer can acquire rights.

13. Upon information and belief, Opposer's MAX name is not a name in which Opposer has rights because Opposer does not use the MAX name in commerce.

14. Upon information and belief, Applicant's use of the MAXPERFORMANCE mark predates Opposer's use of the PERFORMAX name.

WHEREFORE, Applicant demands that the opposition to registration of the MAXPERFORMANCE mark be denied and that Applicant be granted registration of its Mark.

Respectfully Submitted,



Attorneys for Lavelle Industries, Inc.

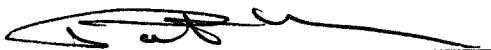
Joseph S. Heino, Esq.
Davis & Kuelthau, s.c.
111 East Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
414-225-1452 (direct dial)
414-278-3652 (direct fax)
jheino@dkattorneys.com

Patrick M. Bergin, Esq.
Davis & Kuelthau, s.c.
111 East Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
414-225-7563 (direct dial)
414-278-3763 (direct fax)
pbergin@dkattorneys.com

CERTIFICATE OF MAILING

The undersigned certifies that the foregoing Answer of Lavelle Industries, Inc. was mailed First Class Mail on April 10, 2012 to:

Richard P. Sybert
Gordon & Rees, LLP
101 West Broadway, Suite 1600
San Diego, California 92101-8217

A handwritten signature in black ink, appearing to read 'P. Bergin', is written over a horizontal line.

Patrick M. Bergin